United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2233

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 74-2233

In the Matter of

CONTINENTAL VENDING MACHINE CORP. and
CONTINENTAL APCO, INC.,

Debtors.

JAMES TALCOTT, INC.,

Appellant,

v.

IRVING L. WHARTON, as Trustee,

Appellee.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF NEW YORK

APPELLEE'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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--x

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BRIEF OF IRVING L. WHARTON, AS TRUSTEE, APPELLEE, IN SUPPORT OF JUDGE MISHLER'S CONFIRMATION OF THE TRUSTEE'S AMENDED PLAN OF REORGANIZATION OVER THE OBJECTION OF JAMES TALCOTT, INC.

Preliminary Statement

This brief is being submitted by Irving L. Wharton, as Reorganization Trustee of Continental Vending Machine Corp. and Continental Apco, Inc. (hereinafter the "Trustee"), as Appellee, in answer to the brief filed by James Talcott, Inc. ("Talcott") in support of its appeal from the decision

of the Honorable Jacob Mishler, United States District Judge, of August 12, 1974, which confirmed the Trustee's Amended Plan of Reorganization (the "Amended Plan") for Continental Vending Machine Corp. ("Continental") and Continental Apco, Inc. ("Apco") over the objection of Talcott. Talcott, which had made separate secured loans to Continental and Apco, proved to have a deficiency in its account with Continental and a surplus in its account with Apco following the liquidation of its collateral. Talcott objected to the Amended Plan on the grounds (a) that the Amended Plan failed to comply with Section 216(7) of the Bankruptcy Act, 11 U.S.C. § 616(7), in that Talcott is "affected" by the Amended Plan but is not granted the protections to which it is assertedly entitled under said section, and (b) that the Amended Plan is not fair and equitable to Talcott within the meaning of Section 221(2) of the Bankruptcy Act, 11 U.S.C. § 621(2). Judge Mishler held that Talcott was simply an unsecured creditor of Continental as to the deficiency, and, as such, its rights are fully protected by the consolidated plan. Judge Mishler also dismissed Talcott's challenge that the Amended Plan is

unfair and inequitable under Section 221(2) of the Bankruptcy Act because it limits secured creditors to specific collateral securing specific indebtedness, holding that Talcott is in the same position under the Amended Plan which it would have occupied if there were no consolidation -- it is an unsecured creditor of Continental and the two corporations as consolidated for the Continental deficiency.

Statutes Involved

Section 216 of the Bankruptcy Act (11 U.S.C. § 616) provides in pertinent part:

> "Sec. 216. A plan of reorganization under this chapter --
>
> (1) shall include in respect to creditors generally or some class of them, secured or unsecured, and may include in respect to stockholders generally or some class of them, provisions altering or modifying their rights, either through the issuance of new securities of any character or otherwise;
>
> * * *
>
> (6) shall specify the creditors or stockholders or any class of them not to be affected by the plan and the provisions, if any, with respect to them;
>
> (7) shall provide for any class of creditors which is affected by and does not accept the plan by the two-thirds majority

in amount required under this chapter, adequate protection for the realization by them of the value of their claims against the property dealt with by the plan and affected by such claims, either as provided in the plan or in the order confirming the plan, (a) by the transfer or sale, or by the retention by the debtor, of such property subject to such claims; or (b) by a sale of such property free of such claims, at not less than a fair upset price, and the transfer of such claims to the proceeds of such sale; or (c) by appraisal and payment in cash of the value of such claims; or (d) by such method as will, under and consistent with the circumstances of the particular case, equitably and fairly provide such protection;

* * *

(14) may include any other appropriate provisions not inconsistent with the provisions of this chapter."

Section 107 of the Bankruptcy Act (11 U.S.C. § 507) provides:

"Sec. 107. Creditors or stockholders or any class thereof shall be deemed to be 'affected' by a plan only if their or its interest shall be materially and adversely affected thereby. In the event of controversy, the court shall after hearing upon notice summarily determine whether any creditor or stockholder or class is so affected."

Section 221 of the Bankruptcy Act (11 U.S.C. § 621) provides:

"Sec. 221. The judge shall confirm a plan if satisfied that --

(1) the provisions of article VII, section 199, and article X of this chapter have been complied with;

(2) the plan is fair and equitable, and feasible;

(3) the proposal of the plan and its acceptance are in good faith and have not been made or procured by means or promises forbidden by this Act;

(4) all payments made or promised by the debtor or by a corporation issuing securities or acquiring property under the plan or by any other person, for services and for costs and expenses in, or in connection with, the proceeding or in connection with the plan and incident to the reorganization, have been fully disclosed to the judge and are reasonable or, if to be fixed after confirmation of the plan, will be subject to the approval of the judge; and

(5) the identity, qualifications, and affiliations of the persons who are to be directors or officers, or voting trustees, if any, upon the consummation of the plan, have been fully disclosed, and that the appointment of such persons to such offices, or their continuance therein, is equitable, compatible with the interests of the creditors and stockholders and consistent with public policy."

Statement of Facts

The Security Agreements

Talcott and Continental entered into a secured receivables factoring agreement effective as of May 11, 1960

pursuant to which Talcott made advances to Continental against its receivables (hereinafter the "Continental Security Agreement"). This agreement provided in part that

> "You [i.e., Talcott] shall be entitled to hold all sums and all property of the undersigned [i.e., Continental], at any time to its credit or in your possession or upon or in which you may have a lien or security interest, as security for any and all obligations of the undersigned at any time owing to you [i.e., Talcott] and/or any company which may now or hereafter be your subsidiary, no matter how or when arising and whether under this or any agreement or otherwise, and including all obligations for purchases made by the undersigned from any other concern factored by you or such subsidiary."

Talcott and Apco entered into a similar agreement as of April 1, 1961 containing language identical to the above-quoted provision (the Apco "Security Agreement").

Continental was not a party to, nor guarantor of, the Apco Security Agreement. Likewise, Apco was not a party to, nor a guarantor of, the Continental Security Agreement.

Talcott made numerous advances to Continental and Apco under these Security Agreements. In 1963 a series of proceedings commencing with the appointment of a conservator at the request of the Securities and Exchange Commission culminated in the filing of involuntary petitions for reorganization under Chapter X of the Bankruptcy Act against both Continental and Apco.

Talcott's Liquidation of Its Security

Subsequent to the appointment of the Conservator, Talcott undertook to, and did, liquidate all of the security it held for the advances previously made to Continental and Apco. Pursuant to an order of the court, Talcott was directed to file an accounting. That accounting is presently proceeding before Magistrate Catoggio, as Special Master. That proceeding will result in fixing the exact amount of the Apco surplus and the Continental deficit. Talcott has asserted that the Apco surplus is $380,000 and that the Continental deficit is $820,000. Talcott Brief at 6a. The Trustee believes that the accounting will result in increasing the Apco surplus, which may be as much as $1,400,000. However, there is no doubt that the accounting will reflect a substantial dollar surplus in the Apco account and a substantial dollar deficit in the Continental account.

Talcott holds both Conservator's and Trustee's certificates in a substantial amount. To date these certificates have not been paid. The Trustee has taken the position in the accounting proceeding that Talcott should have applied the Apco surplus to certain of these obligations. Talcott has asserted that was not required to make

such an application and that it may set the Apco surplus off against the Continental deficiency as a result of the consolidation. See Talcott Brief at pages 12a-14a. Talcott has conceded, however, that in the absence of consolidation it could not apply the Apco surplus to the Continental deficit. See Appendix at 51a-52a. Although the question of the payment of certificates is part of the overall dispute between the Trustee and Talcott, that issue does not affect the resolution of this appeal and the correctness of Judge Mishler's opinion confirming the Amended Plan.

The Amended Plan

The Trustee originally filed a Plan of Reorganization on June 20, 1969. Thereafter on June 15, 1970, the Trustee filed his Amended Plan of Reorganization, the confirmation of which is the subject of this appeal. By order dated May 20, 1971, Judge Mishler approved the filing of the Amended Plan and fixed September 1, 1971 as the date by which creditors were to accept the plan. Judge Mishler's order of December 10, 1971 fixed January 21, 1972 as the date for a hearing to consider confirmation of the Amended Plan. Talcott filed its objection to the Amended Plan on January 14, 1972.

The Trustee filed an Amended Plan, in part, to assure that Talcott, and any other secured creditor, would not obtain an improved security position as a result of consolidation. The order approving the filing of the Amended Plan also provided for consolidation of the Continental and Apco proceedings. (It should be noted that consolidation will not, in fact, occur until such time as the Amended Plan is finally confirmed.) Consolidation was ordered upon the findings, <u>inter alia</u>, that there were numerous transfers of funds in an extremely complex pattern between Continental and Apco which depended wholly upon Continental's needs, with little or no heed paid to the needs of Apco (Appendix at 40a); books and records of Continental and Apco were not maintained in a manner which would permit the accurate reconstruction of all or a substantial portion of the financial transactions between the debtors (Appendix at 40a); and Apco was operated as a division or department of Continental and its business (Appendix at 41a). No testimony was adduced reflecting any intercompany transfers to the detriment of secured creditors, including Talcott.

Questions Presented

I. Does the Amended Plan effectively preclude Talcott from any improvement in its security position as a result of consolidation?

II. May a reorganization plan premised on consolidation deny a secured creditor the right to improve its position, at the expense of unsecured creditors, as a result of the consolidation without complying with the "cram-down" provisions of Section 216(7) of the Bankruptcy Act?

III. Is a reorganization plan premised on consolidation which denies a secured creditor the right to improve his position, at the expense of unsecured creditors, as a result of the consolidation fair and equitable within the meaning of Section 221(2) of the Bankruptcy Act?

IV. Is Judge Mishler's order of August 12, 1974 sufficient without further findings to confirm the Amended Plan?

I

THE AMENDED PLAN EFFECTIVELY PRECLUDES TALCOTT FROM ANY IMPROVEMENT IN ITS SECURITY POSITION AS A RESULT OF CONSOLIDATION

Article I, Definitions, of the Amended Plan provides, under the definition of "Claims" that all claims except the claims of Secured Creditors are to be treated on a consolidated basis. Article II, Property to be Dealt With By The Plan, states that all properties of the debtors will be dealt with on the basis of a merger or consolidation, without prejudice to the rights of secured creditors with respect to specific collateral securing specific indebtedness. See Appendix at 36a-37a. As to all secured creditors (and not just as to Talcott), the Amended Plan goes on the provide that there will be no such pooling, and secured creditors are expressly relegated to the security for which they bargained. Article IV-B, Provisions for the Payment of Secured and Certain Unsecured Creditors, stipulates that "nothing in the Plan shall be, or be deemed to be, an elevation or improvement of the status of a claim filed by any creditor in Class 5 [secured creditors] as a result of the consolidation of the Debtors' Estates." See Appendix at 37a.

These provisions in the Amended Plan are plainly sufficient to preclude Talcott from applying the Apco surplus to the Continental deficiency on consolidation notwithstanding the pooling of assets and liabilities on consolidation. The Amended Plan expressly states that a secured creditor is to be in the same position it would have been in had there been no consolidation.

There is nothing in Chapter X which precludes the incorporation of language of the type quoted above in a plan of reorganization. Section 216(1) of the Bankruptcy Act provides that a plan of reorganization "shall include in respect to creditors generally or some class of them, secured or unsecured, * * * provisions altering or modifying their rights * * *" and Section 216(14) provides a plan also "may include any * * * appropriate provisions not inconsistent with the provisions of this chapter [i.e. Chapter X]". The Amended Plan classifies secured creditors separately from unsecured creditors, and it is immaterial that Talcott happens to be the only member of that class. The provisions in the Amended Plan which prevent Talcott from obtaining a windfall as a result of the consolidation are not inconsistent with any provision of Chapter X. Concededly, a plan

of reorganization cannot be confirmed unless the plan is fair and equitable, but as will be demonstrated hereafter, the Amended Plan is "fair and equitable" to Talcott as well as to all other creditors, within the meaning of that phrase. The absolute priority of Talcott with respect to specific assets pledged to secure the respective claims of Talcott against Continental and Apco has been preserved. Thus, the "cram-down" provisions of Section 216(7) have no application since the Reorganization Trustee does not question Talcott's right to apply pledged Continental assets to the Continental debt or pledged Apco assets to Apco debt, which is all Talcott is entitled to. See Wright v. Union Central Life Insurance Company, 311 U.S. 273, 278-9 (1940) ("Safeguards [in § 75 of the Bankruptcy Act] were provided to protect the rights of secured creditors, throughout the proceedings, to the extent of the value of the property. *** There is no constitutional claim of the creditor to more than that. And so long as that right is protected the creditor is in no position to insist that doubts or ambiguities in the [Bankruptcy] Act be resolved in its favor and against the debtor.")

II

A REORGANIZATION PLAN PREMISED ON CONSOLIDATION MAY DENY A SECURED CREDITOR THE RIGHT TO IMPROVE ITS POSITION, AT THE EXPENSE OF UNSECURED CREDITORS, AS A RESULT OF CONSOLIDATION WITHOUT COMPLYING WITH THE "CRAM-DOWN" PROVISIONS OF SECTION 216(7) OF THE BANKRUPTCY ACT

A. Talcott Does Not Have a Lien on the Apco Surplus for the Continental Deficiency.

Talcott's argument that the Amended Plan violates the "cram-down" provisions of Section 216(7) of the Bankruptcy Act is based on the false premise that it, in fact, has a security interest in the Apco surplus. Talcott urges that it had a lien on the Apco surplus for the Continental deficiency as of the date of the filing of the Chapter X petition, i.e., prior to the time when the findings on which consolidation will be predicated were made and to the consolidation itself, and further urges that consolidation merely renders the lien enforceable because, as Talcott asserted in its brief below, "the necessary consequence of consolidation is obliteration of the separate identities of Continental and Apco and the creation of a single debtor owning the property of both and owing the debts of both." Talcott concedes that it had no cross-collateralization agreement and that it could not have applied the Apco surplus against

the Continental deficiency absent the consolidation which is part of the Amended Plan. Appendix at 51a-52a.

Talcott attempts to justify its assertion that, as of the date of the filing of the Chapter X petition, it had a lien on the then-undetermined Apco surplus for the then-undetermined Continental deficit by reliance upon In re Cichanowicz, 226 F. Supp. 288 (E.D.N.Y. 1964), which held that the validity of a lien does not depend upon the existence of a contemporaneous debt, if the parties so agree. In Cichanowicz, a chattel mortgage was given by the bankrupt as collateral to secure a bank loan evidenced by notes. In less than a year the note indebtedness was paid down to nothing. Two months later the bank again advanced money to the bankrupt. The bank continued to advance money from time to time prior to bankruptcy and the bankrupt made repayments from time to time, although the balance never again dropped to zero. The trustee objected to the bank's taking the property under the mortgage, on the grounds that the chattel mortgage, by its own terms, provided that repayment of the notes would extinguish the mortgage and, thus, when the balance was paid down to zero the mortgage was extinguished

and further advances were unsecured. The court, noting that both the bank and the bankrupt assumed the later advances to be secured under the chattel mortgage, held that reducing the outstanding indebtedness to a zero balance did not extinguish the mortgage "if the parties keep the mortgage alive by agreement, or if the mortgage was given as a continuing security for future loans, and future loans are still in the parties' contemplation." 226 F.Supp. at 291.

The Cichanowicz case simply does not address itself to the situation at hand. As Judge Mishler said in hi opinion, Appendix at 68a:

> "The court finds no authority in Cichanowicz for imposing a lien on surplus remaining after the application of collateral to a secured debt. The security agreement between Talcott and Apco, although broad, cannot be interpreted as creating such a lien. Moreover, Talcott's position is contrary to the long-established, basic principle that '[i]n the absence of an obligation to be secured there can be no lien.'"

Talcott characterizes its lien on the surplus as of a type known as contingent or inchoate.

> "A lien is a charge upon property for the payment or discharge of a debt. It is therefore dependent upon the existence, the amount of, and the provability of the debt. If the debt has been paid or otherwise expunged as for fraud or by set-off, the lien is extinguished. An inchoate lien does not ripen into security until a debt comes into existence." U.S. v. Phillips, 267 F.2d 374, 376-7 (5th Cir. 1959).

The debt which causes an inchoate lien "to ripen" into security must be an obligation within the meaning of the agreement granting the security. The Security Agreements created no such inchoate lien on the Apco surplus for the Continental deficiency because the security of Apco was not given for the debts of Continental and, absent a finding that the indebtedness of Continental is the debt of Apco, no such lien may exist.

Under Talcott's interpretation of its Security Agreement with Apco, which defies common sense, accepted principles of commercial law, and the language of the Security Agreement itself, the right of Apco to the return of any surplus collateral after liquidation is an empty right as it depends completely on the whim of Talcott. Talcott can hardly urge that it was holding on to the collateral as security for future advances in light of the termination of business activities on the part of the debtors almost six years prior to the making of the findings on which consolidation will be based.

Talcott's interpretation of the contract also violates certain age-old principles of secured transactions.

In 1885, the New York Court of Appeals held that a pledgor was bound to return the security pledged upon payment of the note secured. Cass v. Higenbotam, 100 N.Y. 247 (Ct. Appeals 1885). "In the absence of an obligation to be secured there can be no lien." U.S. v. Phillips, 267 F.2d 374, 377 (5th Cir. 1959). Thus, there can be no question that once Apco and Continental ceased doing business and Talcott liquidated its collateral there was no lien on the surplus because there were no further obligations to be secured. See Section 9-404 of the New York Uniform Commercial Code.

Talcott devotes considerable space in its brief to its efforts to demonstrate that it has a lien for obligations of the widest scope. See Talcott Brief at 18a-20a. The only question before this court is whether Talcott's lien is broad enough to permit it to apply the Apco surplus against the Continental deficiency. Talcott has conceded that it is not, at least in the absence of consolidation. See Appendix at 51a-52a. The question of what other charges Talcott can properly make against the Apco and Continental accounts is not present on this appeal and is at issue in the accounting proceeding and will be resolved in that proceeding. See Talcott Brief at pages 12a-13a.

The Apco and Continental Security Agreements each fail to contain any provision allowing Talcott to set off the obligations of a related, parent or subsidiary corporation against the collateral it holds. At the time it entered into the Apco and Continental Security Agreements, Talcott was obviously satisfied that the collateral it was getting was sufficient to cover the obligations due it. Talcott should not now be permitted to place an extremely strained interpretation on the Security Agreements to cover up a clear lack of any cross-collateralization provision. Compare _In re Independent Quilting Co., Inc._, CCH Dec. ¶ 62,007 (S.D.N.Y. 1966).

B. Talcott Is Seeking to Gain An Advantage by Its Failure to Pay Over the Apco Surplus Promptly.

Talcott maintains that its lien may be maintained and it may hold on to the surplus until it somehow becomes convinced that there will be no discovery of a debt to be applied against the surplus. Talcott's logic would suggest that had the bankrupt in _Cichanowicz_ attempted to cancel the mortgage by repayment of the outstanding indebtedness, the bank could have held on to the collateral as long as it wished, as insurance, in case it discovered another debt to apply against it. Talcott claims that it was not required

to pay over the Apco surplus to the Trustee immediately upon its creation as it had a right to retain this surplus "until and unless Talcott should have become satisfied beyond any peradventure of the exhaustion of the remotest possibility of some yet undiscovered obligation subject to the lien, and until a final striking of the balances in its numerous accounts with the debtor." Appendix at 67a-68a.

To reach this incredible conclusion, Talcott relies on the sentence in the Apco Security Agreement quoted supra at page 6. The strained interpretation which Talcott places on this sentence is directly contradicted by the meaning of the Security Agreement as a whole and, in particular, by Paragraph 7 of the Security Agreement. It is quite clear that it was not the intention of the parties that Talcott had the right to hold on to any surplus for so long as it liked once the collateral was liquidated. Paragraph 7 sets out the conditions under which Talcott may liquidate its collateral and provides that Talcott shall return "the overplus, if any, to [the debtor] who shall remain liable to you for any deficiency" on the sale of collateral.

As a whole, the Security Agreement reflects that the purpose of the contract was that Talcott was to act as the sole factor of Apco and that all advances were to be collateralized. Apco and Continental have long since ceased doing business or utilizing a factor. The operation of their businesses ceased on July 31, 1964 when the Trustees conveyed the manufacturing assets to the Vendo Company. As the Fifth Circuit has so succinctly put it in the case of Shaw v. Walter E. Heller & Company, 385 F.2d 353, 356 (5th Cir. 1967), cert. denied 390 U.S. 1003 (1968):

> "In this case the value of Heller's collateral was determined when it was sold for $479,820.57. * * * While Heller may have felt secure, the secured status of a creditor in bankruptcy is more than a state of mind or a method of accounting."

Thus, Talcott should have paid over the Apco surplus years ago. Had Talcott paid over the Apco surplus when it should have, it can hardly be argued that any court would have directed the return of that payment to Talcott if consolidation then occurred.

C. The "Cram-Down" Provisions Are Inapplicable.

As has been demonstrated, Talcott does not have a lien on the Apco surplus for the Continental deficiency under

its Security Agreements. Furthermore, consolidation will not, contrary to Talcott's assertion in its Objection to Confirmation, permit it "to treat the properties of the two debtors in its possession as one and indistinguishable." Appendix at 45a. Apco and Continental are not being formally merged or consolidated; under Article V(4) of the Amended Plan, they are to be separately dissolved upon completion of the distribution of assets. Appendix at 18a. A court of equity is merely administering the assets of the two corporations on a consolidated basis. If the assets of one do not become the assets of the other by being administered on a consolidated basis, then the contractual clause on which Talcott relies has no effect and cannot elevate Talcott into a secured creditor where it has formerly been an unsecured one.

Section 216(7) of the Bankruptcy Act provides certain provisions for the protection of a class of creditors "affected" by a reorganization plan when two-thirds of that class do not accept the plan. Section 107 of the Bankruptcy Act provides that creditors are deemed to be "affected" by a plan only if their interests are materially and adversely affected thereby, and further that the court shall, after

hearing on notice, summarily determine whether any creditor is so affected. Under the Amended Plan, all secured creditors are placed in Class 5 and general unsecured creditors in Class 8. As required by Section 216(6), the Amended Plan provides that only creditors in Classes 7, 8 and 9 are deemed to be affected. Following hearings after notice, Judge Mishler on May 20, 1971 found that only creditors in Classes 7, 8 and 9 are affected by the Amended Plan.

As a secured creditor of Apco, Talcott is not "affected" by the Amended Plan within the meaning of Section 107 of the Bankruptcy Act as its interests are not materially and adversely affected by the Amended Plan. The "cram-down" provisions of Section 216(7) of the Bankruptcy Act would not apply because Talcott was not "affected". As an unsecured creditor of Continental, Talcott is "affected" by the Amended Plan. However two-thirds of the class of unsecured creditors have accepted the Amended Plan and the "cram-down" provisions are inapplicable. As a creditor of the consolidated Apco and Continental, Talcott cannot elevate its position, so that it is not a secured creditor of Continental to the extent of the Apco surplus and, therefore, the "cram-down" provisions of Section 216(7) of the Bankruptcy Act are inapplicable.

III

A REORGANIZATION PLAN WHICH DENIES A SECURED CREDITOR THE RIGHT TO IMPROVE ITS POSITION AS A RESULT OF CONSOLIDATION IS NEVERTHELESS FAIR AND EQUITABLE WITHIN THE MEANING OF SECTION 221(2) OF THE BANKRUPTCY ACT

A. <u>The Aim of Consolidation Is to Approximate Justice for Unsecured Creditors.</u>

The aim of consolidation is to approximate justice for unsecured creditors of the consolidated companies. Consolidation is appropriate when the companies sought to be consolidated have been operated as a single economic entity with little or no regard for their existence as separate corporate entities. Such disregard is normally accompanied by indiscriminate intercompany transfers and guarantees. As a result, the financial condition of each corporation reflects fortuitous circumstances and arbitrary management decisions rather than the actual individual operating results of each company. The cost of attempting to reconstruct the individual assets and operating results of each company is normally prohibitive. Consolidation has the highly desirable result of eliminating intercompany claims and guarantees.

It has been said that "the power to consolidate should be used sparingly because of the possibility of unfair treatment of creditors of a corporate debtor who have dealt solely with that debtor without knowledge of its interrelationship with others." _Chemical Bank New York Trust Company v. Kheel_, 369 F.2d 845, 847 (2nd Cir. 1966). In 1970, the Second Circuit refused to permit consolidation of the Chapter XI proceedings of Meadors, Inc. with those of twelve other debtors because of the injustice which would be worked on the creditors of Meadors, Inc., and, in particular, the debenture holders who vigorously opposed consolidation. _In re Flora Mir Candy Corp._, 432 F.2d 1060 (2d Cir. 1970).

> "While the term has a disarmingly innocent sound, consolidation in bankruptcy, in the form directed in this case, is no mere instrument of procedural convenience, such as consolidation of actions under F.R.Civ.P. 42(a), but a measure vitally affecting substantive rights. *** The inequity of consolidation could scarcely be clearer than in this case. The debentures had been issued when Meadors was an independent company, more than six years before its acquisition by Flora Mir. Yet we have stated that even when the interrelationship already existed at the time credit was extended, 'The power to consolidate should be used sparingly because of the possibility of unfair treatment of creditors of a corporate debtor who have dealt solely with that debtor without knowledge of its interrelationship with others.' Chemical

> Bank New York Trust Co. v Kheel. *** Here there was a near certainty of unfair treatment. Consolidation not only would wipe out Meadors' claim against Flora Mir for the misappropriation of its assets but also would permit the creditors of Flora Mir and the other corporations to share in any recovery in the South Carolina action against Keebler and Atlantic Services for transactions antedating Meadors' joining the Flora Mir group -- transactions in which these creditors had not the slightest legitimate interest." 432 F.2d at 1062-3.

Talcott has not suggested that the court improperly ordered consolidation of the Continental and Apco proceedings. Indeed, as this appeal demonstrates, Talcott is seeking to obtain a windfall advantage from consolidation.

B. <u>A Court of Equity May With Perfect Consistency Pierce The "Corporate Veil" In One Instance and Hold It Up in Another.</u>

That a court of equity may recognize corporate separateness in some instances and disregard it in others as equity requires is well settled.

> "The effect of a grant of a corporate charter to a group of individuals is described in many ways in figurative language. Perhaps the favorite phrase is the 'corporate veil' which courts are supposed to pierce from time to time as circumstances require. We think a more accurate figure is that of a cloak which on some occasions is to be worn and on other occasions is to be stripped off. To talk legal

effect instead of fanciful figures of speech, the corporate fiction can be given effect in some instances and with perfect consistency, disregarded in other instances." In re Pittsburgh Rys. Co., 155 F.2d 477, 484 (3d Cir.), cert. den. 329 U.S. 731 (1946).

The Amended Plan acknowledges that recognition of corporate separateness would be inequitable as to unsecured creditors because Apco was inadequately capitalized and funds were transferred from it depending wholly on Continental's needs, Appendix at 40a, but that failure to recognize corporate separateness as to secured creditors would give a windfall to secured creditors. Thus, the Amended Plan balances the equities between secured and unsecured creditors.

In Anaconda Building Co. v. Newland, 336 F.2d 625 (9th Cir. 1964), certain trade creditors of the parent corporation challenged the District Court's determination that the assets of four subsidiary corporations could not be used to satisfy claims of creditors of the parent corporation. Debentureholders of the subsidiaries strongly opposed the attempt by the creditors of the parent corporation to participate in subsidiary assets. The Chapter X proceedings involving the parent and the four subsidiaries had been consolidated. After considering at length the interrelationship

of the parent and the subsidiaries, the Court of Appeals upheld the District Court. The District Court had concluded that the objecting creditors had not been prejudiced by the corporate relationship existing between the parent corporation and its subsidiaries, and that the debentureholders of the subsidiaries had not been unjustly enriched at the expense of the objecting creditors. The Court of Appeals stressed that the objecting creditors of the parent had relied on the sole credit of the parent. "A piercing of the corporate veil of any of the subsidiary corporations, the [District] court held, was not necessary to do equity but would, in fact, be inequitable per se." 336 F.2d at 628. In conclusion, the Court of Appeals wrote:

> "On the whole, however, we do not believe such evidence substantially undermines the general findings of fact that the subsidiaries were operated as separate entities, that on balance the parent corporation was the beneficiary of the corporate inter-relationship, that the objecting creditors did not rely upon the credit of the subsidiaries and were benefited rather than prejudiced by the way in which the subsidiaries were operated, that there was no fraud or overreaching attributable to the [subsidiary] Acceptance Corporations or debenture holders detrimental to the objecting creditors, and that there was no unjust enrichment of debenture holders. We therefore hold that in all respects essential to the result reached, the findings of fact are not clearly erroneous." 336 F.2d 628.

After reviewing allegations of appellants that the District Court had not given proper credence to the domination of one Ed C. Hughes, Jr. over the parent and subsidiaries and his mismanagement of them as well as to the common officers and directors of the corporation, the Court of Appeals concluded:

> "Circumstances of this kind, considered separately or together, are insufficient to warrant dilution of the assets of an insolvent subsidiary corporation for the benefit of the creditors of the parent corporation and to the detriment of the blameless creditors of the subsidiary." 336 F.2d at 629 (Emphasis supplied).

In *In re Security Products Company*, 310 F. Supp. 110 (E.D. Mo. 1969), a turnover order by a Referee in Bankruptcy was challenged on review. The sole controverted issue in the turnover proceeding before the Referee was whether the corporate entity of Security Products Company ("Security") should be disregarded so that, deeming Pauly Jail Building Company ("Pauly") and Security to be the same corporation, the consideration paid to Pauly would constitute consideration to Security. Both Paul and Security had been adjudged bankrupt in separate voluntary proceedings. Unless the corporations were deemed to be one, a certain transfer to a bank would be deemed to be a fraudulent transfer. The Referee decided that the corporate

entity of the two companies should not be disregarded, thereby deciding the issue adversely to the bank. The District Court upheld the Referee and adopted his findings and conclusions on this point. The Referee extensively considered the reasons for piercing the corporate veil and the cases and learning in this area. The Referee held that a turnover order entered in the proceedings in respect of the parent corporation and directed to the assets of the subsidiary is not tantamount to a decision that all of the creditors of both corporations must share in the aggregate assets pari passu, which is to say that a subsidiary's separate corporate existence may be disregarded for some purposes but not necessarily for all purposes.

> "Thus, the rights of the subsidiary's creditors vis a vis the creditors of the 'parent' corporation are not ignored even where sufficient reason exists for the administration upon the subsidiary's assets in the parent's bankruptcy proceedings. And to that extent, the separate corporate existence of the subsidiary is not being disregarded." 310 F. Supp. at 118.

In concluding that on the facts presented him the corporate entity of Security and Pauly should not be disregarded, the Referee wrote:

> "[I]t is my judgment that to disregard bankrupt's corporate entity would be to disregard the rights of its creditors and to permit an injustice to be worked upon them. That record does not show, in my judgment, that bankrupt's creditors will be inequitably or unjustly enriched if its (the bankrupt's) separate corporate existence is not ignored or disregarded. Such a record does not warrant the equitable relief requested by the bank." 310 F. Supp. at 119.

This case makes it clear that a trustee in bankruptcy can hold up the corporate veil as to some creditors and pierce it as to others as equity requires.

<u>Fish</u> v. <u>East</u>, 114 F.2d 177 (10th Cir. 1940) is another case in point. There, in granting a turnover order in summary proceedings which had the effect of consolidation, the court wrote as follows:

> "In allowing turnover in a summary proceeding, even where separate creditors as to priorities are involved, the issue of recognition of same is not as a rule then determined, though priorities in bankruptcy under equitable principles may be recognized and observed. In re Rieger, Kapner & Altmark, D.C., 157 F.609; In re Eilers Music House, supra." 114 F.2d at 192.

Consolidation of Continental and Apco does not preclude the court from determining whether it would be

inequitable to permit Talcott to obtain a windfall. Equity looks through and beyond form to the substance of a transaction. In re Eilers Music House, 270 Fed. 915 (9th Cir. 1921). See also In re Rieger, Kapner & Altmark, 157 Fed. 609 (S.D. Ohio 1907) where the court held that after a turnover of property, the respective rights of partnership and corporate creditors would be determined in the bankruptcy proceedings. Talcott got what it bargained for and should not be permitted to enrich itself at the expense of the unsecured creditors of Apco. The unsecured creditors of Apco are entitled to see the Apco equity made available to all unsecured creditors through the pooled assets.

C. The Court Has the Equitable Power To Redress Any Inequities Created by Consolidation.

The court clearly has the equitable power to redress any injustices created by consolidation. In Stone v. Eacho, 127 F.2d 284 (4th Cir.), rehearing denied 128 F.2d 16, cert. denied 317 U.S. 635 (1942), consolidation was directed, reversing a lower court decision, on a showing that the Virginia subsidiary was a mere instrumentality of its parent and that justice required consolidation. The court held at page 290:

> "If there are equities in favor of any of the creditors which have not been sufficiently explored in the motion for consolidation and as to which they desire to be heard further, hearing can be afforded them in the consolidated proceedings."

The petition for rehearing was denied on the basis that the foregoing provision adequately preserved the equities of any creditor of the Virginia subsidiary in the consolidated proceeding.

Two recent cases in the United States District Court for the Southern District of New York have permitted consolidation over the objection of certain creditors and the courts have, relying on Stone v. Eacho, ordered that any creditor could apply for appropriate relief on the basis of equities not explored on the motions for consolidation. In the Miller-Wohl Company, Inc. ("Miller-Wohl") case, Docket No. 72-B-892, Miller-Wohl sought consolidation of its Chapter XI proceedings and those of twenty-five of its subsidiaries and sought an order consolidating the proceedings into a single proceedings, pooling all assets and liabilities of the respective debtors and eliminating intercompany claims and guarantees. One trade creditor vigorously opposed consolidation. Bankruptcy Judge Edward J. Ryan nevertheless ordered consolidation and provided in his order that

> "Any creditor may apply for appropriate relief in the consolidated proceeding based upon equities which have not been explored in the motion for consolidation."

The trade creditor appealed the order. Judge Edmund L. Palmieri, United States District Judge for the Southern District of New York, affirmed the order in an unpublished opinion, annexed hereto as Exhibit A. Judge Palmieri stated that the above quoted provision in the order was "sufficient to avoid any possible inequity to the petitioners." No appeal was taken from Judge Palmieri's decision.

Prior to the conversion of the Chapter XI proceedings to Chapter X proceedings, the Creditors' Committee of Lyntex Corporation and one of its creditors applied for an order consolidating the Lyntex proceedings with those of two subsidiaries, R.O.F. Textiles, Inc. ("ROF") and Gottschalk & Co., Inc. ("Gottschalk"), pooling all assets and liabilities of the three debtors and eliminating intercompany claims and guarantees. A number of creditors of ROF and Gottschalk opposed consolidation. After hearing evidence on three days, Bankruptcy Judge John J. Galgay ordered consolidation on January 13, 1974. As a conclusion of law, the court found that

> "Any inequities resulting from consolidation may be redressed by the court in the exercise of its equitable powers during the course of its administration or in any plan of arrangement which may be formulated and filed herein."

The Court's order also provided that any creditor might apply in the consolidated case for appropriate relief based upon equities which had not been explored in the motion for consolidation. Subsequently on January 17, 1974, Bankruptcy Judge Galgay signed an order supplementing the order of consolidation and providing a bar date by which creditors of Gottschalk and ROF were to assert any claim to entitlement to satisfaction out of the separate assets of Gottschalk and ROF and establishing an alternative procedure to separate satisfaction.

As the aforesaid cases amply demonstrate, consolidation once ordered does not compel the identical treatment of all creditors. Thus, a reorganization plan may contain such provisions as are desirable or necessary to preserve the equities of all creditors, including, as in the Amended Plan here, provisions limiting secured creditors to the security they held prior to consolidation and denying secured creditors any improvement in their position by virtue of the consolidation.

D. The Corporate Instrumentality Rule Would Not Have Allowed Talcott to Extend Any Lien on the Apco Surplus to Cover the Continental Deficiency.

Talcott urges in its brief at page 23a that:

> "The findings here established a set of pre-petition facts operative to invoke piercing the veil. The facts found existed for an indeterminate period preceding the petition. Had Talcott's financing agreements with the debtors been terminated, the security liquidated, and the surplus and deficit established at any time prior to the petition, and had Talcott then ascertained the essential facts, it could, if it so chose, have brought an action to invoke the instrumentality rule for the purpose of enforcing its lien on the surplus for the pro tanto payments of the deficiency. <u>And there is no reason to doubt the success of such an action</u> ***." (Emphasis supplied.)

There is every reason to doubt that Talcott would have been permitted to assert its Continental deficiency was secured by the Apco surplus as Talcott entirely misconceives the application of the corporate instrumentality doctrine to the facts in this case. The corporate instrumentality doctrine as expounded in the cases allows a lien on the assets of one corporation to be extended to those of another only when it appears that the collateral has been shifted from one entity to another unbeknownst to the lienor. See

Cattle Owners Corp. v. Arkin, 267 F.Supp. 658 (D.Iowa 1967). No assertion has been made that Apco or Continental shifted collateral between themselves to Talcott's detriment.

It is unlikely that Talcott, even as an unsecured creditor, would have been able to pierce the corporate veil to allow it to reach the Apco's assets for application to the Continental deficiency. The Amended Plan proposes to treat unsecured creditors of Apco and Continental on a consolidated basis because Apco was mistreated by Continental, not vice versa. Anaconda Building Materials Co. v. Newland, 336 F.2d 625 (9th Cir. 1964), discussed at pages 37-39, supra, demonstrates that the corporate veil will not be pierced in order to allow a creditor of a corporation which has received the benefits of the wrongdoing to get at assets of a wronged affiliate or subsidiary corporation.

E. The Court, in the Exercise of Its Power to Allow and Disallow Claims, Could Subordinate the Claim of Talcott if Equity So Required Even Though There Was No Consolidation.

A bankruptcy court has the power to allow or disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against the debtor's estate. Section

2a(2) of the Bankruptcy Act, 11 U.S.C. §11a2. In the allowance or disallowance of claims, the court, in the exercise of its equitable jurisdiction, "has the power to sift the circumstances surrounding any claim to see that injustice or unfairness is not done in administration of the bankruptcy estate." Pepper v. Litton, 308 U.S. 295, 308 (1939).

"The power of the bankruptcy court to subordinate claims or to adjudicate equities arising out of the relationship between the several creditors is complete." Sampsell v. Imperial Paper & Color Corp., 313 U.S. 215, 219 (1941). In Vanston Bondholders Protective Committee v. Green, 329 U.S. 156 (1946), a Chapter X proceeding, the Supreme Court was asked to decide whether the first mortgage bondholders ought to be paid interest on interest as provided in the mortgage indenture which payment would have greatly reduced the share of subordinated creditors in the reorganized corporation. The assets of the debtor were sufficient to pay the first mortgage bondholders in full, including the interest on interest. The District Court had allowed the interest on interest on the grounds that the indenture covenant providing for it was valid under state law. The

Court of Appeals reversed on the grounds that such a covenant was prohibited under state law. The Supreme Court agreed with the conclusion of the Court of Appeals but disagreed its rationale. The Supreme Court's position was, assuming arguendo, that state law allowed interest on interest that:

> "We would still have to decide whether allowance of the claim would be compatible with the policy of the Bankruptcy Act. * * *
>
> In determining what claims are allowable and how a debtor's assets shall be distributed, a bankruptcy court does not apply the law of the state where it sits. * * * [B]ankruptcy courts must administer and enforce the Bankrutcy Act as interpreted by this Court in accordance with authority granted by Congress to determine how and what claims shall be allowed under equitable principles. And we think an allowance of interest on interest under the circumstances shown by this case would not be in accord with the equitable principles governing bankruptcy distributions." 329 U.S. at 162-63.

After discussing the allowability of interest in general, the Court said:

> "It is manifest that the touchstone of each decision on allowance of interest in bankruptcy, receivership and reorganization has been <u>a balance of equities between creditor and creditor or between creditors and the debtor</u>." 329 U.S. at 165 (Emphasis supplied).

In a concurring opinion, Justice Frankfurter wrote:

> "The business of bankruptcy administration is to determine how existing debts should be sat-

isfied out of the bankrupt's estate so as to deal fairly with the various creditors." 329 U.S. at 169.

The interest on interest allowed in the mortgage indenture in Vanston Bondholders may be readily compared with the contract provisions that Talcott relies on here. If the Supreme Court could decide in Vanston, as it did, that interest on interest should not be allowed because of the equities between creditors, there seems to be no reason why this court may not weight the equities among the creditors of Apco and Continental and determine that Talcott should not be allowed to become a secured creditor of Continental as to the amount of the surplus in its account with Apco. Talcott has put forward no compelling reason which would warrant balancing the equities in its favor over other creditors so as to allow it to set off the Continental debt against the Apco surplus.

F. The Absolute Priority Rule Does Not Require that Talcott be Treated as a Secured Creditor of Continental to the Extent of the Apco Surplus.

"Under the absolute priority rule, a plan is not 'fair and equitable' unless it provides participation for claims and interests in complete recognition of their strict priorities, and unless the value of the debtor's assets supports the extent of the participation afforded each class

of claims or interests included in the plan." 6A Collier, Bankruptcy, ¶11.06 at 613 (14th Ed.). None of the cases cited in the discussion of the absolute priority rule in Collier nor any other case revealed by research presents a fact pattern similar to the one presented in the instant case. Talcott is participating to the extent of the value of its claims and interests. It cannot elevate its status by a bootstrap operation.

G. Talcott's Reliance on Chemical Bank v. Kheel is Misplaced.

Under the Amended Plan, Talcott will not be permitted to realize upon collateral against which it had no lien prior to consolidation. Talcott will not be permitted to apply the proceeds of accounts receivable of Apco to Continental debts. Talcott contends that this is unfair, inequitable and discriminatory and that it is entitled to realize upon such collateral as a result of the consolidation and consequent pooling of assets. Talcott contends that as a result of consolidation the assets of Apco become the assets of Continental and the assets of Continental become the assets of Apco, and thus, as each other's assets, are within the scope of Talcott's lien. Talcott relies heavily on

the 1966 decision of the Second Circuit Court of Appeals in Chemical Bank New York Trust Company v. Kheel, 369 F.2d. 845, which it asserts supports its right to the collateral and demonstrates the correctness of its position on the effect of pooling of assets.

In Kheel, Chemical Bank New York Trust Company ("Chemical"), along with certain other creditors, opposed the motion of the United States of America, a major unsecured creditor, to consolidate the Chapter X proceedings with respect to eight corporations all owned or controlled by one Manuel E. Kulukundis. Chemical, alleged to be a secured creditor, held a mortgage on a ship owned by one of the debtor corporations, Seatrade Corporation ("Seatrade"), and the ship had been sold to satisfy the secured debt. However, the mortgage was under attack. Chemical was concerned that the mortgage might be defeated and that its claim would become an unsecured one, in which case it believed that it would realize little, if anything, if it were to share with the combined unsecured creditors in a common pot, rather than with other Seatrade creditors in the identifiable Seatrade assets. Consequently, Chemical vigorously asserted that consolidation of the assets and liabilities of all eight

debtors would be an abuse of discretion absent a showing that the bank knowingly dealt with the group as a unit and relied on the group for payment. Although the Court of Appeals approved consolidation over the objections of Chemical, it did so reluctantly.

Circuit Judge Friendly, in a concurring opinion, took strong exception to the notion that the practice of handling corporations so as to make a determination of their assets and liabilities difficult justified failure to make a reasonable approximation in order to do justice to a creditor who has relied on the credit of one.

> "Equality among creditors who have lawfully bargained for different treatment is not equity but its opposite, and the argument for equality has a specially hollow ring when made by the United States whose priority over other creditors will necessarily be enhanced by having the assets of all these corporations thrown into hotchpot." 369 F.2d at 848.

Judge Friendly joined in confirming the lower court's rder for consolidation because of insufficient proof by Chemical that it had relied on the separate credit of Seatrade. He opined that Chemical's main reliance had been on what it believed to be a valid mortgage of a ship and on Kulukundis' guarantee, and not on any other assets.

Talcott's position cannot be equated with the

Government's enhanced position in _Kheel_ and Talcott's efforts to make this equation are unpersuasive. _Kheel_ does not deal with consensual liens; it deals only with a statutory priority. The Government is granted priority in the Bankruptcy Act itself and it was this priority which gave the Government the right to be paid ahead of general creditors. There is nothing in _Kheel_ which suggests that the Government's priority rested on a lien which attached to the consolidated assets. Judge Friendly made it quite clear in _Kheel_ that throwing the assets of all the debtors into "hotchpot" simply meant that there was more money available to satisfy the Government's claim. Absent consolidation, the Government's priority claim could have been paid only up to the limit of the assets available in the estate of the particular debtor against whom it had its claim. Indeed, as an unsecured creditor, _albeit_ one with a statutory priority, the Government had suffered with other unsecured creditors because of the indiscriminate shifting of assets between corporations. _Quaere_ whether a reorganization plan premised on consolidation could provide for a modification of the government's "super-priority". This question was not raised in _Kheel_.

Both the majority and concurring opinions in

the Kheel case evidence a concern, even a reluctance, to compel the creditor who has relied on the separate credit of a single debtor to share in consolidated assets. As discussed, infra, this concern has been shared by a number of other courts in consolidation proceedings. See Stone v. Eacho, 127 F.2d 284 (4th Cir.), rehearing denied 128 F.2d 16, cert. denied 317 U.S. 635 (1942); Soviero v. Franklin National Bank of Long Island, 328 F.2d 446 (2d Cir. 1964); Anaconda Building Materials Co. v. Newland, 336 F.2d 625 (9th Cir. 1964); In re Flora Mir Candy Corp., 432 F.2d 1060 (2d Cir. 1970).

Analysis of the concerns expressed by the courts in these cases, particularly concern over possible prejudice to creditors in a consolidation, demonstrates that Talcott has, in fact, not been prejudiced by the consolidation and no inequity results from limiting it as a secured creditor to the security for which it bargained. If there were no consolidation of Continental and Apco, Talcott clearly would be an unsecured creditor of Continental as to amounts owing after liquidation of the security. Consolidation under the Amended Plan will leave Talcott as an unsecured creditor

as to the Continental deficiency. Talcott, moreover, as a secured creditor of Continental was not relying on the general credit of Continental; its primary reliance was clearly on the security offered. It dealt with Continental and Apco as separate entities. No prejudice to Talcott can result under the Amended Plan by limiting Talcott to "specific security securing specific indebtedness". In so doing, the Amended Plan is giving Talcott exactly what it bargained for: a secured creditor status to the extent that its collateral was adequate to secure its debt. Talcott concedes that there is no valid cross-collateralization agreement and that absent consolidation Talcott would have no contractual right to apply the surplus in the Apco account to the deficit in the Continental account. See Appendix at 51a-52a. As Judge Mishler so correctly stated in his opinion at page 8:

> "To allow Talcott to apply the Apco surplus to the remaining Continental deficiency through the fictional secured creditor status which Talcott now advances would be to give it considerably more than what it bargained for, to the prejudice and detriment of the other unsecured creditors."

IV.

JUDGE MISHLER'S ORDER OF AUGUST 12, 1974 IS SUFFICIENT WITHOUT FURTHER FINDINGS TO CONFIRM THE AMENDED PLAN

Judge Mishler's order of August 12, 1974 contains the following finding:

> "The court is satisfied that the plan meets the requirements of §221."

In light of the testimony adduced at the hearings on confirmation with respect to the various matters with which the Judge must be satisfied in order to confirm a reorganization plan, Judge Mishler's opinion is clearly sufficient. See Transcript of Hearing of January 21, 1972 on Confirmation of Plan at 38-61. Separate findings as to each and every requirement set forth in §221 would be superfluous.

Talcott asserts in its brief at page 24a that the record reflects that the plan was accepted by 71.8 percent in amount of the claims of general creditors and that the required amount is 75 percent. This appears to be an oversight on Talcott's part as Section 179 of the Bankruptcy Act clearly requires acceptance by only two-thirds of the members of a class.

Should this court determinate that Judge Mishler's order should be supplemented, it can remand the proceedings for the purpose of permitting that order to be modified to include more specific findings based upon the hearings already had.

CONCLUSION

The Amended Plan is fair and equitable to all creditors, including Talcott, within the meaning of Section 221 of the Bankruptcy Act even though it denies secured creditors the right to an improvement in their position as a result of consolidation. The equitable powers of the court extend to the making of any order necessary or desirable to preserve the appropriate relationships between creditors. Talcott is not a secured creditor of Continental to the extent of the Apco surplus and, thus, the "cram-down" provisions of Section 216(7) of the Bankruptcy Act are inapplicable. Judge Mishler's order of August 12, 1974 contains sufficient findings to warrant confirmation of the Amended Plan. Judge Mishler's order should be affirmed in all respects.

Respectfully submitted,

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IN THE MATTER OF THE MILLER-WOHL COMPANY, INC., No. [illegible]

JUNE 15, 1973:

FILED JUN 15 1973

The creditor of a subsidiary corporation seeks to reverse the Referee's order consolidating these 26 arrangement proceedings. The provisions in the consolidation order, set forth in paragraph 6 are as follows:

> "Any creditor may apply for appropriate relief in the consolidated proceeding based upon equities which have not been explored in the motion for consolidation." Stone v. Eacho, 127 F.2d 284 (4th Cir.), cert. denied, 317 U.S. 635 (1942).

These are sufficient to avoid any possible inequity to the petitioner.

To have a fragmented proceeding here would constitute an intolerable burden upon the Referee without any consequent advantages to the interested parties. I regard this, as one of the attorneys said, as a classic case requiring consolidation, and as a case in which it would be to the interests of all creditors that consolidation be granted. I do not think that R & H Sales, the petitioner here, has been unfairly treated or that there is any prejudice prospectively possible. The escrow fund which was established and from which the petitioner may recover entitles him to recover a larger share if he can establish that it relied solely on the credit of Welles Stores and not on the credit of Miller-Wohl, the parent company, and if he can demonstrate the probability of a larger dividend in an unconsolidated Welles proceeding as against the probable dividend in the Miller-Wohl proceeding. That is all petitioner is fairly entitled to.

Petition dismissed. Order of the Referee affirmed in all respects.

U. S. DISTRICT COURT FILED JUN 15 1973 S. D. OF N. Y.

EDMUND L. PALMIERI
U. S. D. J.

... DISTRICT
... DISTRICT OF NE...

In the Matters of

THE MILLER-WOHL COMPANY
also trading as "THREE ..."
"JEAN NICOLE", "DEL RE..."
and "WIGLESS", et al
Debt...

PETITION TO REVIEW

HAHN, HESSEN, MARGOLIS &
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CH 4-6500

EXHIBIT "A"

Certification of Service

I hereby certify that on January 13, 1975, I served two copies of the foregoing brief on Hahn, Hessen, Margolis & Ryan, at 350 Fifth Avenue, New York, New York and on the Securities and Exchange Commission, 26 Federal Plaza, New York, New York, Att: Lawrence Tuscano by causing same to be delivered by messenger.

I further certify that on January 13, 1975, I served two copies of the foregoing brief on Emil, Kobrin, Klein & Garbus, 540 Madison Avenue, New York, New York, Att: Stewart E. Lavey, Esq.; Kaye, Scholer, Fierman, Hayes & Handler, 425 Park Avenue, New York, New York, Att: Sheldon Oliensis, Esq.; Curtis, Mallet-Prevost, Colt & Mosle, 100 Wall Street, New York, New York, Att: John Campbell, Esq.; Sullivan, Donovan, Hanrahan, McGovern & Lane, 70 Pine Street, New York, New York, Att: Gerald W. Jarrett, Esq.; Leinwand, Maron, Hendler & Krause, 10 East 40th Street, New York, New York, Att: Elliott Krause, Esq.; David Trager, Esq., United States Attorney, Eastern District of New York, Brooklyn, New York; Robert Marcus, Esq., 345 Park Avenue, New York, New York 10022 by depositing same in the United States mail, postage paid, properly addressed.

Prudence B. Abram

Prudence B. Abram

Prudence B Abram